Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of GCB Communications, Inc.	)	WC Docket No. 11-141
d/b/a Pacific Communications and Lake	)	
Country Communications, Inc. for	)	
Declaratory Ruling	)	

OPPOSITION OF U.S. SOUTH TO PETITION FOR DECLARATORY RULING

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Dated: August 31, 2011

SUMMARY

U.S. South was the prevailing party in the underlying federal court litigation giving rise to this primary jurisdiction referral. U.S. South does not object to the Commission providing declaratory ruling relief to clarify the meaning and operation of its payphone compensation rules, and indeed sought to refer this issue to the Commission, over the opposition of the payphone service provider (PSP) Petitioners, at trial and on appeal. The interpretation of those rules now proposed by Petitioners, however — one that would make a nullity of this Commission's requirements for Flex-ANI transmission and permissible carrier use of Flex-ANI technology for tracking payphone-originated calls to completion — is unjustified and unwarranted.

The Commission should respond to the courts by reiterating that payphone-specific Flex-ANI must be transmitted with each payphone-originated call and by declaring that an interexchange carrier may permissibly rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system under Section 64.1310(a)(1) of the FCC's per-call payphone compensation rules. 47 C.F.R. § 64.1310(a)(1). It would make no legal or policy sense, as Petitioners here contend, for the huge undertaking of Flex-ANI implementation, an integral part of the Commission's shift more than a decade ago from a per-phone to per-call payphone compensation scheme, to be completely irrelevant to a carrier's obligations under the Commission rules implementing Section 276 of the Communications Act of 1934. 47 U.S.C. § 276.

There is no basis in the Commission's payphone plan, its various orders and waiver decisions or public policy under Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them under the payphone regulations. Petitioners have a remedy under the Act against their serving LECs if, like here, Flex-ANI is not correctly

transmitted with their payphone calls, so there is no question of PSPs being left without compensation. Yet Petitioners and other PSPs may not, under the existing payphone compensation scheme, lawfully or fairly transfer that liability to Completing Carriers like U.S. South in the absence of any proof that the IXC violated the Commission's payphone regulations.

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OPPOSITION OF U.S. SOUTH TO PETITION FOR DECLARATORY RULING

U.S. South Communications, Inc. ("U.S. South)", by its attorney and pursuant to Sections 1.2 and 1.45(b) of the Commission's Rules, 47 C.F.R. §§ 1.2, 1.45(b), hereby opposes the declaratory ruling sought by the payphone service provider ("PSP") petitioners, GCB Communications, Inc. and Lake Country Communications, Inc. (collectively "Petitioners"), in the captioned proceeding.[1]

INTRODUCTION

U.S. South was the prevailing party in the underlying federal court litigation giving rise to this primary jurisdiction referral.[2] U.S. South does not object at all to the Commission provid-

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[1] The Wireline Competition Bureau invited public comment on the Petition on August 25, 2011. U.S. South reserves its right to submit comments and/or reply comments in response to the WCB *Notice* in addition to this formal Opposition.

[2] *GCB Comms., Inc. v. U.S. South Comms., Inc.,* No. 07-cv-02054-SRB (D. Ariz. Oct. 30, 2009), *rev'd,* 2011 U.S. App. LEXIS 8882, 53 Comm. Reg (P&F) ¶ 176 (9th Cir. April 29, 2011), *rehearing denied,* Order, No. 09-17646 (9th Cir. May 23, 2011). A copy of the Court of Appeals' slip opinion is annexed as Exhibit 1 for the convenience of the Commission and its staff; it is also available at http://www.ca9.uscourts.gov/datastore/opinions/2011/04/29/09-17646.pdf.

U.S. South sought a primary jurisdiction referral to the Commission for interpretation of the payphone rules, but was opposed by Petitioners at trial and on appeal. *GCB,* 2011 U.S. App. LEXIS 8882 at *11-12, slip op. at 5588-89. We therefore readily agreed to this consensual

ing declaratory ruling relief to clarify the meaning and operation of its payphone compensation rules under Section 276 of the Communications Act of 1934, 47 U.S.C. § 276. Rather, we submit that Petitioners' requested interpretation of those rules — one that would make a nullity of this Commission's requirements for Flex-ANI transmission and permissible carrier use of that technology for tracking payphone-originated calls to completion — is unjustified and unwarranted.

To the contrary, the Commission should respond to the courts by declaring that an interexchange carrier ("IXC") may rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system.[3] It would make no legal or policy sense, as Petitioners contend, for the huge undertaking of Flex-ANI implementation, an integral part of the Commission's shift more than a decade ago from a per-phone to per-call payphone compensation scheme, to be completely irrelevant to a carrier's obligations under the Commission rules implementing Section 276.

BACKGROUND

The issue before this Commission is the same as that addressed by the Court of Appeals for the Ninth Circuit, namely "whether U.S. South was required to pay GCB for completed coinless payphone calls — dial-around calls — if U.S. South did not receive coding digits that would identify the calls as GCB payphone calls." *GCB Comms., Inc. v. U.S. South Comms., Inc,* 2011 U.S. App. LEXIS 8882 at *1, slip. op. at 5583 (9th Cir. April 29, 2011). Although they disparage the Ninth Circuit's analysis, including claiming falsely that it relied on only "a single

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referral and concur that the Court of Appeals' opinion encouraged such action by the district court on remand. *Petition* at 8 & n.7, quoting *GCB,* slip op. at 5596 n.20.

[3] 47 C.F.R. § 64.1310(a)(1).

Payphone Order in isolation,"[4] Petitioners cannot and do not argue that the Court of Appeals improperly framed the issue:

> GCB's argument is that when U.S. South completed calls made from GCB's payphones, U.S. South owed it dial-around compensation for the calls, even if the proper coding was absent or incorrect at the time U.S. South received them. Both parties make factual arguments disclaiming fault for the failure of Flex-ANI digits to appear with the disputed calls at the time U.S. South received them. Beyond that, GCB contends that the FCC regulations require completed calls to be compensated, without regard to whether the completing carrier received Flex-ANI coding, or to why it was not received. . . . [T]he district court held that because "the relevant regulations placed the burden for accurately tracking calls on the completing carrier (U.S. South) and not the PSP (plaintiffs)," U.S. South owes GCB dial-around compensation for the disputed calls "regardless of whether the proper Flex-ANI digits were transmitted."

GCB, slip op. at 5585 (citations omitted).

In this context, the *Petition* seeks to elevate the district court's flawed reasoning into a rigid rule of law that contradicts the reality of payphone calls, which are handled by numerous parties in addition to the PSP and the "completing carrier." The question is not whether PSPs alone are required to "ensure" that Flex-ANI codes are in fact transmitted with each of their payphone calls. *Petition* at 6, 8, 9. Instead, it is whether a so-called Completing Carrier[5] may permissibly rely on Flex-ANI as the basis for its call-tracking system under the Commission's rules. If the answer to that question is yes — as it most assuredly is — then there is no basis in the Commission's payphone compensation plan, its various waiver orders or public policy under

[4] *Petition* at 6. In fact, the Court of Appeals' opinion shows the panel expressly cited and relied on the entire series of Commission rules, decisions and orders, which as discussed below all state that Flex-ANI must be "transmitted" with every payphone call as part of its ANI. Slip op. at 5589 n.9, 5590 & nn.10-11, 5591, 5593 & n.18; *see infra* at 10-13.

[5] 47 C.F.R. § 64.1300(a).

Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them under the payphone rules.[6]

Nothing in Section 276 or the Commission's implementing rules can or should make carriers' payphone compensation obligations a matter of strict liability or reduce the costly and long process of converting local exchange carrier ("LEC") central offices to Flex-ANI compatibility to a matter of legal irrelevance. Petitioners have a remedy under the Act against their serving LECs if Flex-ANI is not transmitted with payphone calls in accordance with the payphone rules, and should not be permitted unilaterally to transfer that liability to carriers like U.S. South.

It is important in this context to precisely delimit the requirement imposed by Congress in Section 276 of the Act. Section 276 is not self-executing; its command is that that *the Commission* establish a "per-call payphone compensation plan" to ensure that PSPs receive compensation for "each and every completed [payphone] call." 47 U.S.C. § 276. A carrier is therefore obligated to remit payphone compensation in accordance with the Commission's implementing rules. Conversely, a PSP cannot independently enforce Section 276, but instead may seek damages under the Act from a carrier for non-payment if the carrier violates the Commission's implementing rules, which the FCC has rightfully held is an "unreasonable practice" for purposes of Section 201.[7]

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[6] Revealingly, Petitioners' court complaint did not assert that U.S. South violated any regulation promulgated pursuant to Section 276 of the Act as part of the "per-call payphone compensation plan" developed by the Commission in its series of multiple decisions from 1996 to 2004.

[7] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19990 at ¶ 32 (2003) (failure to remit compensation pursuant to the FCC's payphone rules is "an unjust and unreasonable practice"). *See* 47 U.S.C. § 201; *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,* 550 U.S. 45 (2007); *Metrophones Telecomms., Inc. v. Global*

In that light, a proper understanding of the history and structure of the Commission's lengthy efforts to balance the rights and obligations of PSPs, LECs and IXCs with respect to identifying, tracking and compensating payphone calls is vital. The Commission recognized that because answer supervision is provided on call termination only to the last IXC handling a payphone call — known as a "Completing Carrier" — it was important to require IXCs to establish and deploy a system for tracking payphone calls to completion, as the Completing Carrier alone has direct access to completion data. At the same time, the Commission understood and expressly recognized that when Section 276 was enacted, Completing Carriers had no technical means to identify calls as originating from payphones because the "coding digits" associated with such calls were not unique to payphones. Accordingly, the Commission and the Bureau imposed two parallel requirements.

1. LECs were required to deploy a system of Flex-ANI that utilizes unique coding digits transmitted in a call's ANI to identify a call as having originated from a payphone.[8]

2. IXCs were required to establish a system that "accurately" tracks completed calls, to issue periodic reports to PSPs and to certify annually, via independent audit, the compliance of their call-tracking systems with the Commission's payphone rules.[9]

Crossing Telecomms., Inc., 423 F.3d 1056, 1064 (9th Cir. 2005) ("[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of § 201(b) of the Act"), *aff'd,* 550 U.S. 45 (2007).

[8] *See* below at Section I(A) for a full discussion of the Commission's many reiterations of the requirement that LECs "transmit" coding digits with each payphone-originated call. As the Bureau explained in 1998: "We clarify in this order that *the transmission of payphone-specific coding digits by LECs through Flex-ANI is required* unless a LEC hardcodes into all of its switches all the payphone-specific coding digits discussed herein as necessary for identifying payphones calls for per-call compensation." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5001 at ¶ 2 n.9 (1998) (emphasis supplied).

[9] 47 C.F.R. § 64.1310(a)(1) (call tracking); 47 C.F.R. § 64.1320(a) (audits).

These dual requirements were fundamental to the Commission's efforts to implement Section 276. Recognizing that per-call compensation was not at first technically feasible, the Commission initially mandated a transitional system of per-phone compensation, under which each IXC (exceeding a revenue threshold) paid to PSPs a fixed charge per phone based on a list of payphone ANIs issued quarterly by the LECs.[10] In order to supply the information to IXCs necessary to support a per-call compensation scheme, the Commission then ordered the LECs to deploy Flex-ANI to provide a means of differentiating payphone-originated calls, eligible for compensation if completed, from other calls encompassed in the prior system of ANI "information digits" or "ANI ii" (such as hotel, hospital and other "restricted" phones for which billing to the line was not permitted).[11] Together, these twin mandates allowed IXCs to identify payphone calls, and thus program their switches to record completion data for such calls, permitting payment of compensation to PSPs on a per-call basis. Compensation was and remains due at the FCC-prescribed "default" rate in the absence of a PSP/IXC agreement on per-call compensation charges. 47 C.F.R. § 64.1330(d).

It is in this context that the present primary jurisdiction referral comes before the Commission. The federal court litigation established that Petitioners and U.S. South had not agreed on a per-call compensation rate. It is also undisputed that U.S. South properly remitted compensation at the prescribed "default" per-call rate for *every* completed call that included associated Flex-ANI data identifying it as a payphone call.[12] Petitioners were unable to prove

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[10] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd. 20541, 20567, 20578 at ¶¶ 50, 72 (1996).

[11] *Id.* at 20597-98 ¶ 113.

[12] "The parties agree that U.S. South has compensated GCB for all calls for which U.S. South received the payphone specific Flex-ANI coding digits." *GCB,* slip op. at 5585 n.3. The

why the disputed calls lacked correct Flex-ANI identifiers and declined to introduce evidence from their serving LECs that Flex-ANI had been correctly transmitted. Nor did they claim, let alone prove, that U.S. South's call tracking system was in any way deficient or otherwise violated the requirement of Section 64.1310(a)(1) of the rules that each carrier utilize an "accurate" call tracking methodology.[13]

It was only by means of a tortured interpretation of the Commission's rules that the district court was able to enter judgment for Petitioners. "[T]he district court determined the result based on a legal conclusion: it interpreted the FCC regulations on dial-around compensation to require that once PSPs 'set up (or provision) their payphone lines with Flex-ANI capability' they are owed compensation for completed calls, even if the Flex-ANI coding is not sent to or received by the completing carrier." *GCB,* slip op. at 5585. The Court of Appeals reversed, concluding that the Commission's 1996, 1998 and 2003 payphone orders — which require that "LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXCs" — mean that Flex-ANI codes must accompany each compensable payphone call "because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP. That, in the long run, facilitates the prompt payment of amounts owed to all PSPs." *Id.,* slip op. at 5592.

The purpose of this primary jurisdiction referral is for the Commission to decide whether the Court of Appeals was correct. Petitioners continue to assert that they have no responsibility to transmit Flex-ANI coding digits, but the Ninth Circuit did not rule they did. Instead, the Court

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disputed calls were received by U.S. South without the required 27 or 70 Flex-ANI payphone identifiers. Overwhelmingly, U.S. South received incorrect 00 or 07 info digits for these calls.

[13] 47 C.F.R. § 64.1310(a)(1).

of Appeals expressly recognized "the fact that in the way the industry developed, the Flex-ANI codes are not directly transmitted by the payphones themselves — those phones are not set up to do so." *Id.,* slip op. at 5592. The Court's opinion explains that *as between PSPs and Completing Carriers,* the risk for absent or incorrect Flex-ANI information falls on the PSP.[14] If the Ninth Circuit is right, as U.S. South respectfully suggests it was, that does not mean a PSP is to be denied compensation for completed calls for which specific payphone Flex-ANI was missing. Instead, it only means that a Completing Carrier which utilizes Flex-ANI as the basis for its call tracking system cannot be required to compensate PSPs for calls missing correct Flex-ANI information where, as here, there is no showing that it did anything wrong. When something fails in the Flex-ANI system, one of the many entities involved in a payphone call (the PSP, the originating LEC, the intermediate carrier or the Completing Carrier) should be held accountable. But in the absence of evidence, as in this case, that the failure was the fault of the Completing Carrier, there is no basis in the Commission's rules to impose liability on that party under Section 201 for an "unreasonable practice."

[14] "[I]t is the duty of the PSP — vis-a-vis the completing carrier — to make sure" that Flex-ANI is transmitted because "for payphones to be eligible for compensation 'payphones will be required to transmit specific payphone coding digits.'" *Id.,* slip op. at 5592-93, quoting *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5006-07 at ¶ 13 (1998).

ARGUMENT

I. PETITIONERS FRAME THE WRONG ISSUE FOR FCC RESOLUTION BY IGNORING THE FUNCTION OF FLEX-ANI AS AN INTEGRAL PART OF A CARRIER'S "ACCURATE" CALL-TRACKING SYSTEM

The *Petition* properly sets out the specific question referred by the district court (*Petition* at 3), but frames the inquiry incorrectly by ignoring the function of Flex-ANI as an integral part of a Completing Carrier's "accurate" call-tracking system under Section 64.1310(a)(1) of the Commission's payphone compensation rules. There is no dispute that, despite the repeated language used by the Commission throughout 1996 through 1998, even "smart" payphones do not themselves actually transmit Flex-ANI information. That function is performed by LECs at the central office serving a payphone. Under the Commission's rules, IXCs — including switched-based resellers ("SBRs") like U.S. South — are permitted to utilize Flex-ANI as the technical basis for tracking payphone calls to completion.[15] Therefore, in asking whether "the completing carrier is obligated to pay the PSP per-call compensation for completed coinless calls," *Petition* at 3, the district court's referral is inquiring how to harmonize the Commission's Flex-ANI mandate with the obligations imposed on carriers under the Section 276 per-call payphone compensation plan.

That question cannot be answered by looking only in the abstract to the rights and obligations of PSPs. As Petitioners and the federal courts explicitly recognize, there are a number of "carriers in the call path." *Petition* at 3. One of those, the Completing Carrier, has an obligation to deploy a call tracking system. Another of those, the serving (originating) LEC, has an obligation to insert payphone-specific Flex-ANI coding digits into the call set-up information

[15] Completing Carriers are not required to utilize Flex-ANI technology; they may use the technology of their choice to meet their call tracking obligations. *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 (2003).

transmitted along with coinless payphone calls. In cases, such as this one, where there has been an unexplained failure of Flex-ANI transmission, the entitlement of PSPs to per-call compensation cannot be answered by looking only to whether the PSP has ordered a payphone line from the serving LEC. *Id.* That is because the payphone compensation obligations of IXCs arise from the Commission's implementing rules, not Section 276 itself.

Like all Completing Carriers. U.S. South's legal obligation is to remit payphone compensation to PSPs for all completed payphone-originated calls in accordance with the Commission's rules. Petitioners may be correct that their own regulatory obligation is satisfied by ordering a payphone line, which in turn triggers a LEC's obligation to provide payphone-specific Flex-ANI with each call. But that alone does not resolve the issue because it does not indicate one way or another whether the IXC has defaulted on its requirement to deploy and maintain an "accurate" payphone call-tracking system.

There are two sides to the relationship between PSPs and carriers; each has specific obligations under the payphone rules. Where an IXC has not been shown to have failed to comply with the Section 64.1310(a)(1) requirement for an accurate call tracking system, the Commission's payphone regulations have not been violated. That in turn yields the issue on which Petitioners resort to *ipsi dixit*, namely whether a carrier that is presumptively in compliance with the Commission rules is required to remit payphone compensation for calls, as the district court held but the Ninth Circuit reversed, "regardless of whether the proper Flex-ANI digits were transmitted." *GCB,* slip op. at 5585 (citations omitted). As we demonstrate below, that ultimate issue must be decided adversely to Petitioners if the Commission's Flex-ANI mandate and its per-call compensation requirement are to have regulatory significance. To address the issue of a PSP's line-ordering responsibility without reference to the corresponding

obligation of an IXC is to make a nullity of the Flex-ANI mandate and its central function in the transition from a per-phone to per-call payphone compensation system.[16]

A. This Commission Has Repeatedly Reaffirmed That Flex-ANI, Where Available, Must Be "Transmitted" With Every Payphone Call

As the Ninth Circuit explained, it is evident that Flex-ANI must accompany each payphone call "because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP." *GCB,* slip op. at 5592. The Commission's payphone rules and orders wholly validate this conclusion. The FCC has repeatedly reaffirmed that Flex-ANI, where available from a LEC central office, must be "transmitted" with every payphone call.

In 1998, the Common Carrier Bureau clarified that the transmission and provision of payphone-specific Flex-ANI codes to carriers with all calls was "a prerequisite to payphone per-call compensation."[17] This is a straightforward application of the Commission's payphone orders, which likewise consistently held that Flex-ANI must be "transmitted" and "generated" with every payphone call. For instance, the Commission's initial 1996 *Payphone Order* concluded that "each payphone should be required to generate 07 or 27 coding digits within the

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[16] Petitioners also distort the Court of Appeals' ruling by claiming, without citation, that the Ninth Circuit "shifted the burden of ensuring that dial-around calls are properly tracked as they progress through the call path squarely on the PSP instead of on the Completing Carrier." *Petition* at 8. Nonsense. What the Court ruled is plain and altogether sensible: "GCB, *through its LEC,* must assure that the Flex-ANI is transmitted into the system; their duty ends there. . . . *Others have the duty of tracking and capturing* that information, one way or another, once it is sent into the system." *GCB,* slip op. at 5593, 5595 (emphasis supplied).

[17] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5006 at ¶ 13 (1998).

ANI for the carrier to track calls."[18] In its 1996 *Reconsideration Order,* the Commission clarified that "[e]ach payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line."[19]

The later 1998 Bureau *Coding Digit Waiver Order* reiterated that "for payphones to be eligible for compensation, payphones will be required to transmit specific payphone coding digits,"[20] and that "[t]his limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls."[21] Indeed, the *Coding Digit Waiver Order* uses "transmit" or "transmitting" to describe the requirement that payphone-specific coding digits be provided more than 50 times. And as the Commission's 2003 *Remand Order* summarized, "in order to track a payphone call to completion, an [SBR] must identify *whether a call originates from a payphone (via information digits),* where it originates and terminates (via ANI information), and whether it is completed and therefore compensable (via answer supervision)."[22]

More generally, the Commission's compensation plan utilized an initial transition period of per-phone compensation, in which carriers exceeding a certain size were directed to remit a

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[18] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd. 20541, 20591 at ¶ 98 (1996).

[19] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Order on Reconsideration, 11 FCC Rcd. 20541, 20591 at ¶ 64 (1996).

[20] 13 FCC Rcd. at 5006 ¶ 13 (citation omitted).

[21] *Id.* at 5007 ¶ 14.

[22] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19992-93 ¶ 35 (2003) (emphasis supplied).

specified amount to each ANI identified as a payphone by the serving LEC.[23] This was replaced one short year later (subject to extensions via waiver) with a per-call system under which the transmission of payphone-specific coding digits is explicitly a "prerequisite" to compensation. Denying carriers the right to rely on Flex-ANI is thus the equivalent of requiring that they pay off of payphone ANI lists, the very system the Commission resolved as a matter of administrative policy should be in place only temporarily.

Petitioners devote an inordinate portion of their pleading to rationalizing what the Commission intended by stating repeatedly that payphones must "generate" and "transmit" Flex-ANI. *E.g., Petition* at 10-11, 15-19. Yet there is no question that Flex-ANI is not in fact generated today by payphones, and that neither the district court nor the Ninth Circuit have imposed any such requirement. Perhaps the Commission or the Common Carrier Bureau misunderstood the expected capabilities of "smart" payphones when the compensation plan was developed more than a decade ago.[24] But it is self-evident that the Commission explicitly linked Flex-ANI availability from "each payphone" with a carrier's ability to identify payphone-originated calls for compensation purposes. As the Bureau explained, "before they can receive per-call compensation from IXCs for subscriber 800 and access code calls," payphone calls must

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[23] "Because call tracking did not then exist, the Commission ordered that compensation be paid on a per-phone, rather than per-call basis." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21277 ¶ 6 (2002).

[24] The Bureau believed at the time that "[a] payphone is 'coding-digit-capable' when it is able to transmit payphone-specific coding digits that are capable of reaching an IXC point of presence (POP) for subscriber 800 and access code calls from payphones using 10XXX and 101XXXX." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5520 at ¶ 36 (1998).

include "payphone-specific coding digits." 13 FCC Rcd. at 5007 ¶ 14.[25] The Ninth Circuit thus properly reasoned that whether Flex-ANI is transmitted by the PSP or its serving LEC is immaterial to the fact that the Commission has required that all payphone calls include correct Flex-ANI to be eligible for payphone compensation:

> As we see it, that makes no real difference: whether an LEC transmits the Flex-ANI digits to the payphone, which then transmits them — necessarily back through the LEC — into the system, or whether that circular route is avoided and the LEC adds the Flex-ANI digits when the call comes to it from the payphone, the result is necessarily the same. By the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached — or should be.

GCB, slip op. at 5592.

B. Carriers Were Given The Ability To Utilize Flex-ANI As a Means of Per-Call Tracking And Compensation And Therefore Must Be Able To Rely Upon The Presence Or Absence of Payphone "Coding Digits" For Compensation Purposes

Petitioners are wrong in claiming that PSPs have no ability to monitor or confirm that Flex-ANI is being transmitted by LECs with their payphone calls. *Petition* at 8, 11, 15-16. There are procedures for determining whether LEC payphone lines are operating correctly, test numbers available from IXCs and other non-technical means — such as an unexpected drop in completion rate (and thus compensation) from a Completing Carrier — for PSPs to utilize as "red flags" for identifying and correcting a system deficiency.

But that is not the issue presented to the Commission. Rather, it is whether under the Flex-ANI rules, carriers may utilize Flex-ANI coding digits as the basis for an accurate call tracking system. Under the payphone compensation regulations a PSP's obligation may, in fact, be ended once the payphone owner orders a payphone line from a LEC. That the PSP has met its

[25] For PSPs to be eligible for compensation, "payphones will be required to transmit specific payphone coding digits." *Id.,* 13 FCC Rcd. at 5006-07 at ¶ 13.

individual obligations, however, does not mean that it can lawfully recover unpaid compensation from Completing Carriers for calls that lack correct Flex-ANI.

It is beyond question that the Commission permits IXCs to utilize Flex-ANI as the basis for their payphone call tracking systems. Indeed, since the Commission itself has emphasized that an "accurate" system under Section 64.1310 (a)(1) does not need to be perfect,[26] there is no basis to assert that failure to accurately track "each and every" payphone call is somehow *per se* unreasonable under the Act. While a Completing Carrier is not required to rely on Flex-ANI, that system was mandated in order to provide the precise per-call information necessary for IXCs to reliably track payphone calls and, as the Ninth Circuit found (and Petitioners do not deny), is the industry standard for identifying payphone traffic. *GCB,* slip op. at 5584 ("Flex-ANI has become the standard method for determining whether a call originated from a payphone."). Indeed, the Commission in 2003 ruled that as a Completing Carrier, an SBR "must pay a PSP directly based on the SBR's own call tracking data." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19975 at ¶ 1 (2003). Since that call tracking data is allowed to consist of Flex-ANI information supplied with the calls, the necessary conclusion is that IXCs must pay compensation for all completed calls that Flex-ANI information shows were made from payphones.

In short, carriers were given the ability by this Commission to utilize Flex-ANI as a means of per-call tracking and compensation and, therefore, must be able to rely upon the presence or absence of payphone "coding digits" in discharging their compensation obligations

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[26] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 n.109 (2003).

under the per-call payphone rules. Petitioners' convoluted attempts to argue otherwise (*Petition* at 31-37) are invalid. This Commission has hardly "made clear in several ways" that Flex-ANI transmission is not a condition precedent to per-call compensation. *Id.* at 32. The exceptions Petitioners cite — such as locations where Flex-ANI is not available, the period more than a decade ago prior to implementation of Flex-ANI, and carriers that do not rely on Flex-ANI for payphone call tracking purposes — are irrelevant to the legal issue presented here. That is the question whether a carrier permissibly relying on Flex-ANI as its payphone call-tracking mechanism is entitled to limit compensation to calls delivered with proper Flex-ANI identifiers. None of those other circumstances has any bearing on this question.

Petitioners appear to suggest that carriers are required to remit payphone compensation without regard to Flex-ANI because the Commission has never explicitly stated that its receipt *for particular calls* is a legal predicate to payment. But the Bureau has expressly called Flex-ANI a "prerequisite" to per-call compensation, and the full Commission itself has repeatedly declared that both the "generation" and "transmission" of Flex-ANI with all payphone calls are required. In fact, in the 2003 *Remand Order,*[27] the FCC explained that from the very start of its payphone regime in 1996:

> the Commission required the local exchange carriers (LECs) *to transmit with every payphone call* the Automatic Number Identification (ANI) digits for each payphone, including each LEC payphone, *to enable a facilities-based carrier to recognize in its call tracking system that a call had originated with a payphone.*

At bottom, Petitioners would have this Commission believe that it imposed a mandatory call-identifying technology on the telecommunications industry, yet should apply its payphone compensation rules such that use and reliance on that technology is legally irrelevant. That non-

[27] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 199981-82 at ¶ 13 (2003) (emphasis supplied).

sensical interpretation — which directly conflicts with language the Commission has consistently used to describe the Flex-ANI obligation — cannot be adopted without an unjustified departure by this agency from the terms repeatedly employed in its orders and the specific call-tracking obligation imposed on IXCs under Section 64.1310 (a)(1) of its rules.[28]

II. REQUIRING PAYPHONE COMPENSATION "IRRESPECTIVE" OF THE TRANSMISSION OF FLEX-ANI CODING DIGITS WOULD MAKE FLEX-ANI IRRELEVANT, STRANDING THAT INVESTMENT AND NULLIFYING THE COMMISSION'S PER-CALL COMPENSATION PLAN

The gist of the *Petition* is that because the Commission has addressed "the equity of placing the responsibility for tracking and paying coinless calls on the Completing Carrier," per-call compensation to PSPs must be owed "irrespective of whether payphone-specific coding digits are received for a particular call." *Petition* at 6. That the IXC is the "primary economic beneficiary" of dial-around calls (*id.*), however, has no bearing on the appropriate role of Flex-ANI in the Commission's per-call payphone compensation plan.

Petitioners repeat the fallacy that "Section 276 of the Act [requires] the Completing Carrier to provide per-call compensation to the PSP for each completed call." *Id.* at 6, 37. That is manifestly untrue. The Act itself imposes no compensation or any other obligation on IXCs, which are entirely a create of this Commission's rules and orders.[29] Nor does the Commission's

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[28] The Commission's 2003 *Remand Order,* which also moved payment responsibility to the SBR as Completing Carrier, summarized that "[i]n satisfying its liability obligation to a PSP, the SBR must establish its own call tracking system, have a third party attest that the system accurately tracks payphone calls to completion, and pay a PSP directly based on the SBR's own call tracking data." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19975 at ¶ 1 (2003). There has never been any contention in this case that U.S. South did anything other than precisely what is required by these rules.

[29] Section 276 is directed to the FCC alone. That is why the courts have unanimously concluded that a claim for payphone compensation cannot arise under Section 276 itself. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,* 550 U.S. 45 (2007); *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.,* 423 F.3d 1056, 1064 (9th Cir. 2005),

proper recognition of the "equity" of requiring SBRs to track completed payphone calls at all lead to the conclusion that the transmission of payphone-specific Flex-ANI is irrelevant to the compensation requirement. Payphone traffic is a complex system, involving several different entities and carriers, all of which must operate properly for payphone calls to be identified, tracked, completed and compensated. To isolate the obligations of a PSP alone, without reference to the corresponding mandates on LECs and IXCs, is to allow equity to override the law as expressed in this Commission's regulations. As the Commission has ruled, "[s]ection 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides."[30]

The result of Petitioners' unprecedented interpretation of the Commission's rules is to read the Flex-ANI requirement out of the payphone plan entirely. Under GCB's approach, if the serving LEC fails to configure Flex-ANI correctly, if the LEC's switch software malfunctions, or if the Flex-ANI system fails for any reason to recognize a PSP line as a payphone line (and thus, as here, transmits incorrect, non-payphone Flex-ANI coding digits), responsibility in each of these circumstances would nonetheless lie totally with the SBR as Completing Carrier. The *Petition* does not discuss the "equity" of that untoward result because there is none.

Petitioners also rely heavily on the uncontested fact that "the PSP has neither any visibility into nor any control over the network[s] over which a call is carried." *Petition* at 6.

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aff'd, 550 U.S. 45 (2007); *Greene v. Sprint Communications Co.,* 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied,* 541 U.S. 988 (2004). "[T]he conclusion that it is 'unreasonable' to fail ... to reimburse [PSPs] is not a § 276 conclusion; it is a § 201(b) conclusion." *Global Crossing,* 550 U.S. at 60. Moreover, "[not] every violation of FCC regulations is an unjust and unreasonable practice." *North County Comms. Corp. v. Cal. Catalog & Tech.,* 594 F.3d 1149, 1159 (9th Cir. 2010).

[30] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302-03 ¶ 82 (2002). "Section 276 does not permit the Commission to lawfully 'require one company to bear another one's expenses.'" *Id.* (citing *Illinois Public Telecomms. Assn. v. FCC,* 117 F.3d 555, 556 (D.C. Circuit 1997).

That is true, but not directly relevant. This Commission labored mightily to craft a payphone scheme that allocated responsibility among all parties and carriers involved in the "call path" of payphone-originated traffic. As the 2003 *Remand Order* explained, the per-call payphone compensation plan is designed to "strike the best balance between full compensation for the PSPs and maximum fairness to other carriers."[31] It took the PSPs' limited information into account by imposing the call-tracking obligation on IXCs and the Flex-ANI responsibility on LECs. That balance of rights and responsibilities would be evaded by permitting PSPs to recover per-call compensation when the basis for the right — the transmission of payphone-specific Flex-ANI information — is absent.

This is not to say that if a Completing Carrier's system is faulty and fails to recognize or record Flex-ANI, in other words is not "accurate" for purposes of Section 64.1310 (a)(1), an IXC can lawfully refuse to remit per-call compensation. In such a circumstance, pointedly **not** presented in this case or by the *Petition,* the Completing Carrier would have violated the Commission's payphone rules and should presumptively be liable. The *Petition* nonetheless seeks to go further by arguing that the PSP has no responsibility to establish that the IXC was in any way responsible or at fault for the Flex-ANI failure.

Such a result is both inequitable and unlawful because, as noted, a Completing Carrier's compensation obligation arises only under the Commission's payphone compensation rules, not the terms of Section 276 if the Act itself. In the absence of a violation by the IXC, the FCC has no basis in law to require compensation to be paid for calls as to which the predicates for compensation do not exist. One of those is the "transmission" of Flex-ANI. As between the

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[31] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19976 at ¶ 4 (2003).

Completing Carrier and the PSP, it is undeniable that the Commission has consistently ruled that the transmission of payphone-specific Flex-ANI is a "prerequisite" to payphone compensation.

Petitioners' efforts to evade that reality has absurd consequences. The most significant of these is that the entire process of mandating that LECs reconfigure their central offices ("COs") to support Flex-ANI would become a nullity. That massive effort was not simple, quick or without cost; indeed, the Bureau was forced to waive it temporarily because the LECs found that converting to Flex-ANI was far more time-consuming and difficult than anticipated.[32] Nonetheless, under Petitioners' approach that capital investment in switch upgrades would be stranded because IXCs would receive no benefit from Flex-ANI and, as a business matter, would have no incentive to order it from the LECs. If compensation liability attaches "irrespective of whether payphone-specific coding digits are received for a particular call," *Petition* at 6, there is no benefit to a Completing Carrier from Flex-ANI at all.

To be clear, payphone compensation disputes do not arise in a vacuum. Here, for instance, GCB and Lake Country had known for a long time that their completion rate to U.S. South was lower than other IXCs, but refused to notify U.S. South, to test their lines with Petitioners' serving LECs, to challenge the call-tracking audit certifications filed by U.S. South or to file a compensation complaint with the Commission. They chose instead, after remaining silent for years, to proceed directly to federal court without any proof that U.S. South's system was at all deficient and, remarkably, never even claimed that U.S. South had violated *any* Commission regulation.

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[32] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 FCC Rcd. 4998 (1998).

Petitioners are correct that PSPs do not have the technical ability to control the transmission of Flex-ANI associated with their payphone calls. They are incorrect in claiming they are powerless to do anything about a defect or failure of Flex-ANI, and plainly wrong in suggesting that PSPs have no "visibility" at all to whether Flex-ANI is operating correctly from their serving LECs. The answer to the PSPs' relative lack of information, however, is not to rewrite the Commission's payphone compensation plan to make Flex-ANI irrelevant. That would represent a colossal waste of the time and resources expended, by LECs and IXCs alike, to implement what has become the industry standard for identifying payphone calls.

III. PSPs HAVE A LEGAL CLAIM AGAINST THEIR SERVING LECs IF THE LECs FAIL TO TRANSMIT CORRECT PAYPHONE FLEX-ANI, SO LEAVING PSPs WITHOUT COMPENSATION IS NOT AT ISSUE HERE

The Petition leaps from the assertion that a PSP has "discharged its responsibility in demonstrating [that it] has ordered ('provisioned') a payphone line from its serving LEC," to the conclusion that "even if a Completing Carrier could demonstrate that it took steps to ensure Flex-ANI was functioning properly," compensation is nonetheless owed even for calls lacking payphone-specific coding digits. *Petition* at 37. The rationale advanced is that PSPs would "otherwise be unable" to receive compensation to cover their costs for dial-around payphone traffic. *Id.* That is incorrect.

First, the argument has no bearing on the issue referred to this Commission. The federal courts did not find, and the Petition does not contend, that U.S. South violated any FCC rule or order as to implementation of Flex-ANI as part of its payphone call tracking system. Second, the argument is again based expressly on the incorrect presumption that "Section 276 requires that PSPs be compensated" for "'each and every call' . . . for which the Completing Carrier is the 'economic beneficiary.'" *Id.*

Most significantly, the proposition refuses to recognize that there are players other than IXCs involved in the payphone call path. The Commission has required that LECs implement Flex-ANI and that payphone Flex-ANI be "generated" and "transmitted" with payphone calls. Where a LEC defaults on that obligation, it has violated this Commission's rules and orders, and is thus liable under Section 201 of the Act. Accordingly, PSPs have a remedy against their serving LECs if Flex-ANI is not transmitted, provided incorrectly or fails for any reason to be included with their calls to IXCs that have ordered and permissibly rely on those payphone identifiers.

In short, PSPs will not be left without a compensation remedy if the Commission interprets its rules, consistent with the repeated commands that Flex-ANI be included with payphone calls as a "prerequisite" to per-call compensation, to permit IXCs to rely on Flex-ANI as the basis for their call tracking systems and limit payments to completed payphone calls delivered with correct Flex-ANI information.

CONCLUSION

For all the foregoing reasons, the Commission should respond to the federal courts by (a) reiterating that payphone-specific Flex-ANI must be transmitted with each payphone-originated call, and (b) declaring that an interexchange carrier may permissibly rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an

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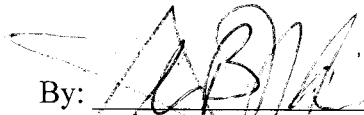
"accurate" payphone call-tracking system under Section 64.1310(a)(1) of its per-call payphone compensation rules.

Respectfully submitted,



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Dated: August 31, 2001

EXHIBIT 1

Slip opinion of the United States Court of Appeals for the Ninth Circuit in *GCB Comms., Inc. v. U.S. South Comms., Inc.*, 2011 U.S. App. LEXIS 8882 (9th Cir. April 29, 2011), *rehearing denied,* No. 09-17646 (9th Cir. May 23, 2011).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GCB COMMUNICATIONS, INC., an Arizona corporation, DBA Pacific Communications; LAKE COUNTRY COMMUNICATIONS, INC., a Minnesota corporation,

Plaintiffs-Appellees,

v.

U.S. SOUTH COMMUNICATIONS, INC., a Georgia corporation,

Defendant-Appellant,

and

UNIDENTIFIED COMPANIES I THROUGH X,

Defendant.

No. 09-17646

D.C. No. 2:07-cv-02054-SRB

GCB COMMUNICATIONS, INC., an Arizona corporation, DBA Pacific Communications; LAKE COUNTRY COMMUNICATIONS, INC., a Minnesota corporation,

Plaintiffs-Appellees,

v.

U.S. SOUTH COMMUNICATIONS, INC., a Georgia corporation,

Defendant-Appellant,

and

UNIDENTIFIED COMPANIES I THROUGH X,

Defendant.

No. 10-16086

D.C. No. 2:07-cv-02054-SRB

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
March 15, 2011—San Francisco, California

Filed April 29, 2011

Before: J. Clifford Wallace, Ferdinand F. Fernandez, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

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Albert H. Kramer, Dickstein Shapiro LLP, Washington, D.C., for the amicus, American Public Communications Council, Inc.

OPINION

FERNANDEZ, Circuit Judge:

U.S. South Communications, Inc. (U.S. South) appeals from the judgment entered against it and in favor of GCB

Communications, Inc. and Lake Country Communications, Inc. (collectively GCB) after a bench trial. At issue is whether U.S. South was required to pay GCB for completed coinless payphone calls — dial-around calls — if U.S. South did not receive coding digits that would identify the calls as GCB payphone calls. We reverse and remand for further proceedings.

BACKGROUND

GCB is a payphone service provider (PSP), which owns public payphones. U.S. South is an issuer of prepaid calling cards. The disputed calls in this case were placed on GCB's payphones using U.S. South's calling cards.

When a coinless call is made on a payphone, it is initially received by the local exchange carrier (LEC) serving that geographic region. The LEC then passes the call to an interexchange carrier (IXC), and the IXC then routes the call to the carrier that completes the call (the "completing carrier," which in this case is U.S. South, a switch-based reseller (SBR)). For the calls at issue in this case that were completed by U.S. South, Level Three Communications (L3) was U.S. South's IXC. Federal Communications Commission (FCC) regulations require an SBR to compensate PSPs for completed calls that were placed on their payphones.[1] Dial-around calls are coinless calls placed at a payphone where the caller does not utilize the PSP's chosen long distance provider, and for which the PSPs receive no compensation from the caller. U.S. South is the completing carrier when individuals place calls using its prepaid calling cards. A call is deemed completed when the called party answers the telephone. As calls are routed through the telephone communications network, the various carriers in the call path exchange information so that

[1] *See, e.g., In re Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("2003 Payphone Order") Report and Order, 18 FCC Rcd. 19975, 19976, ¶ 1 (2003).

each carrier knows what to bill for its contribution to the completed call.

U.S. South identifies which payphones were used to place calls with its calling cards by utilizing technology called "Flex-ANI." Every payphone is assigned an Automatic Number Identification (ANI), which is essentially its phone number. Flex-ANI is software that enables the LEC to determine whether a particular call was originated from a payphone by matching the ANI of the phone from which the call is made against a database of payphone ANIs. If the ANI is identified as a payphone ANI, the LEC, using Flex-ANI, will generate a two digit code of either 27, 29, or 70 and attach that code to the payphone's ANI at the LEC's switch. The codes are not actually attached to the ANI at the payphone itself. Flex-ANI has become the standard method for determining whether a call originated from a payphone.

In order for the system to function properly, the originating LEC and each subsequent carrier must have Flex-ANI capability. IXCs, like L3, have an obligation to provide all of the call data they receive at their switches, without manipulation, to SBRs, like U.S. South, including the Flex-ANI coding digits if received. If L3 does not receive Flex-ANI digits when the call is passed to it, neither will U.S. South.

When U.S. South completes a call, the data from that call is captured at its switch. If U.S. South receives a call with Flex-ANI coding digits identifying the call as having been placed on a payphone, it will add that call to a database used to determine dial-around compensation owed to individual PSPs, like GCB. If a call does not include the identifying digits, it will be discarded as not compensable. On a quarterly basis, U.S. South forwards its compensable call data to Atlantax Systems, Inc., which it hires to process and pay the dial-around compensation it owes to each individual PSP.

At root, GCB's argument is that when U.S. South completed calls made from GCB's payphones, U.S. South owed it dial-around compensation for the calls,[2] even if the proper coding was absent or incorrect at the time U.S. South received them. Both parties make factual arguments disclaiming fault for the failure of Flex-ANI digits to appear with the disputed calls at the time U.S. South received them. Beyond that, GCB contends that the FCC regulations require completed calls to be compensated, without regard to whether the completing carrier received Flex-ANI coding, or to why it was not received. U.S. South argues that if it did not receive Flex-ANI digits, the regulations require compensation only if it can be found that the completing carrier or IXC is at fault.

The district court did not resolve that factual issue after the bench trial. Instead, the district court determined the result based on a legal conclusion: it interpreted the FCC regulations on dial-around compensation to require that once PSPs "set up (or provision) their payphone lines with Flex-ANI capability" they are owed compensation for completed calls, even if the Flex-ANI coding is not sent to or received by the completing carrier. Moreover, the district court held that because "the relevant regulations placed the burden for *accurately* tracking calls on the completing carrier (U.S. South) and not the PSP (plaintiffs)," U.S. South owes GCB dial-around compensation for the disputed calls "regardless of whether the proper Flex-ANI digits were transmitted." On that view of the law, the only factual finding necessary to resolve the case was whether GCB had properly "set up" its payphones with Flex-ANI capability. The court found that it had. U.S. South appealed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

[2]The parties agree that U.S. South has compensated GCB for all calls for which U.S. South received the payphone specific Flex-ANI coding digits.

In this statutory and regulatory area of the law, we review a district court's legal interpretations, which are constrained by *Chevron*,[3] de novo. *See Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009). A district court's conclusions of law following a bench trial are also reviewed de novo. *See JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125 (9th Cir. 2010). We review a district court's denial of a request to refer a case to an agency under the primary jurisdiction doctrine for abuse of discretion. *See Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). But if the district court has committed an error of law, that would constitute an abuse of discretion. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). We review the factual findings underlying a district court's decisions for clear error. *See JustMed*, 600 F.3d at 1125; *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009).

We review evidentiary rulings for abuse of discretion, but will not reverse those unless it is more probable than not that an error, if any, tainted the outcome. *See Valdivia v. Schwarzenegger*, 599 F.3d 984, 993-94 (9th Cir. 2010). Moreover, we review a district court's case management decisions for abuse of discretion. *See O'Neill v. United States*, 50 F.3d 677, 687-88 (9th Cir. 1995).

DISCUSSION

U.S. South raises a number of issues besides the central issue of who bears the expense when the completing carrier does not receive the Flex-ANI coding numbers. Three of those are at the threshold: does GCB have a cognizable claim; is even considering the question here a violation of principles of deference to administrative agencies; and should the district court have applied the principle of primary jurisdiction? Others can be considered after we dispose of the central issue:

[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

did the district court err when it made evidentiary rulings; did it err when it made case management decisions; did it use the wrong prejudgment interest rate; and did it improperly determine the fee award?

I. *Threshold Issues*

This group of issues revolves around U.S. South's wish that the district court had not heard the case at all. Its laments take three forms.

U.S. South first states that the district court had no power to grant relief, by which it appears to mean that GCB did not state a claim because no right of action is provided for by law. That is a most problematic position in any event,[4] but we need not address it at this time because the argument was not presented to the district court.[5] In short, the alleged defect is not one of jurisdiction[6] and U.S. South has waived it.[7] We will not consider the issue.

Next, U.S. South argues that the district court, somehow, violated the doctrine that requires deference to an interpretation of statutes or regulations by an administrative agency,

[4]*See* 47 U.S.C. § 201(b) (unreasonable actions by a carrier are unlawful); *id.* § 206 (carrier liable to persons injured by unlawful actions of the carrier); *id.* § 207 (a damaged person may sue in district court); 2003 Payphone Order, 18 FCC Rcd. 19975, 19990, ¶ 32 (a failure to pay pursuant to the FCC's payphone rules is "an unjust and unreasonable practice."); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms.*, 550 U.S. 45, 47-48, 127 S. Ct. 1513, 1516, 167 L. Ed. 2d 422 (2007) (FCC order "is a reasonable interpretation of the statute.").

[5]In fact, U.S. South admits that it did not file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) because of its own tactical considerations, that is, it thought it could expedite matters if it did not.

[6]*See Burks v. Lasker*, 441 U.S. 471, 476 n.5, 99 S. Ct. 1831, 1836 n.5, 60 L. Ed. 2d 404 (1979); *Ball v. Rodgers*, 492 F.3d 1094, 1102 n.12 (9th Cir. 2007).

[7]*See WildWest Inst. v. Bull*, 547 F.3d 1162, 1172 (9th Cir. 2008).

here the FCC. *See Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 672, 127 S. Ct. 2518, 2537-38, 168 L. Ed. 2d 467 (2007); *Chevron*, 467 U.S. at 842-45, 104 S. Ct. at 2781-83; *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1073 (9th Cir. 2010). That principle is clear enough. However, the district court did not ignore any interpretation by the FCC; rather, it engaged in the common judicial task of construing the language of an order, which the FCC has not construed in any way antithetical to the district court's reading. Indeed, the FCC has been silent on that subject. Thus, the district court did not run afoul of *Chevron*. *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).

Well, then, says U.S. South, if the FCC has not construed its regulation, it should do so, and the district court abused its discretion when it failed to refer the issue to the FCC pursuant to the doctrine of primary jurisdiction. But, of course, the primary jurisdiction doctrine is not jurisdictional at all in the usual sense; "it is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek*, 307 F.3d at 780. It is useful, and can be used, in instances where the federal courts do have jurisdiction over an issue, but decide that a claim "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002).

Here, as a general matter, we know that Congress was especially concerned about payment of full and fair compensation to payphone operators,[8] and that the FCC has issued a number of orders designed to assure that the congressional intent is

[8]*See* 47 U.S.C. § 276(b)(1)(A).

carried out.[9] Moreover, the FCC has declared that the failure to pay is unjust and unreasonable. 2003 Payphone Order, 18 FCC Rcd. 19975, 19990, ¶ 32. Thus, the basic compensation concept, with all of its complexity, is not before us. What is before us is the relatively easier task of construing the language of the FCC orders. While, as we will explain, we do not agree with the district court's construction of the order in question, based upon what that court had before it when it was asked to refer the issue to the FCC, we are unable to hold that it abused its discretion. *See United States v. W. Serum Co., Inc.*, 666 F.2d 335, 338 (9th Cir. 1982); *see also Cnty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1251-52 (9th Cir. 2009). Especially is that true where, as here, U.S. South waited until shortly before trial to raise the issue at all. *Cf. CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 253 (3d Cir. 2007) (where primary jurisdiction issue not raised until after trial, it was waived); *United States v. Campbell*, 42 F.3d 1199, 1202 (9th Cir. 1994) (same).

Having disposed of those preliminary issues, we can now address the central issue in this case.

II. *Payphone Operator Compensation*

[1] As already noted, Congress wanted to ensure that PSPs receive compensation when calls are completed using their payphones; it directed the FCC to establish a plan to accomplish that. *See* 47 U.S.C. § 276(b)(1)(A). To effectuate that directive, the FCC promulgated regulations which require completing carriers to compensate PSPs on a per-call basis for calls made on their payphones. *See* 47 C.F.R. § 64.1300. The

[9] *See, e.g., In re Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd. 15636, 15661, ¶ 79 (2004); 2003 Payphone Order, 18 FCC Rcd. 19975, 19990, ¶ 32; *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions in the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd. 1778, 1805-06, ¶ 59-60 (1997).

regulations also require completing carriers to "establish a call tracking system that accurately tracks coinless" payphone calls.[10] 47 C.F.R. § 64.1310(a)(1). Completing carriers must undergo audits of their tracking systems to ensure that PSPs are being properly compensated. 47 C.F.R. § 64.1320(a). To assist IXCs and completing carriers in tracking payphone calls, the FCC required LECs to implement Flex-ANI technology at their switches.[11]

The dispute in this case is over dial-around calls placed at GCB's payphones, but for which the Flex-ANI digits were not received by U.S. South. While the parties argue over who erred regarding those digits, the district court saw no need to resolve that question because, in its opinion, it did not matter as long as GCB had made a provision for transmitting the Flex-ANI number, even if the number was not transmitted. We do not agree that the FCC's requirements can be read in that way.

[2] The FCC imposed a requirement that:

> LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXCs. The provision of payphone-specific coding digits is a prerequisite to payphone per call compensation payments by IXCs to PSPs for subscriber 800 and access code calls.

1998 Payphone Order, 13 FCC Rcd. 4998, 5006, ¶ 13 (footnote reference omitted); *see also In re Implementation of the*

[10]Completing carriers need not use Flex-ANI technology; they may use the technology of their choice to meet their tracking obligations. *See* 2003 Payphone Order, 18 FCC Rcd. 19975, 19994, ¶ 39.

[11]*In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* ("1998 Payphone Order"), Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5050, ¶ 99 (1998); *see also id.* at 5006, ¶ 13.

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd. 21233, 21265-66, ¶ 64 (1996) (stating that: "payphones will be required to transmit specific payphone coding digits" and "[e]ach payphone must transmit coding digits."). In discussing a waiver, which was being provided by the order, the FCC went on to explain: "This limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls." 1998 Payphone Order, 13 FCC Rcd. 4998, 5007, ¶ 14.

[3] The district court essentially interpreted these provisions to mean that PSPs need only provide for transmission of the Flex-ANI digits, even if the digits were never transmitted into the system. As we see it, that is not a proper reading of the plain language[12] of the order; when one is obligated to transmit something or provide something to another, it is contrary to ordinary usage to say that one need only make provision to do so, even if one does not provide or transmit at all. A natural reading[13] of the words in question leads to a conclusion that the Flex-ANI digits must, indeed, be transmitted in the first place. As dictionary definitions show,[14] that accords with the usual active meaning of the words "transmit"[15] and

[12]When the text of a statute or regulation is read, we look to its plain meaning. *See United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004) (regulations); *Eisinger v. FLRA*, 218 F.3d 1097, 1102 (9th Cir. 2000) (statutes).

[13]*See Carcieri v. Salazar*, ___ U.S. ___, ___, 129 S. Ct. 1058, 1064-65, ___ L. Ed. 2d ___ (2009); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406, 119 S. Ct. 1402, 1407, 143 L. Ed. 2d 576 (1999).

[14]*See Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010).

[15]*See, e.g.*, Webster's Third New International Dictionary 2429 (1986) (transmit means "to cause to go or be conveyed to another person or place"; The Oxford English Dictionary 414 (2d ed. 1989) (transmit means "[t]o cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space; to convey, transfer.").

"provide."[16] That reading also makes sense because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP. That, in the long run, facilitates the prompt payment of amounts owed to all PSPs.[17]

We are mindful of the fact that in the way the industry developed, the Flex-ANI codes are not directly transmitted by the payphones themselves — those phones are not set up to do so. Thus, rather than an LEC transmitting the code digits to the PSP, which then transmits them from the payphones to the IXCs, the PSP will purchase the appropriate lines from the LEC. When a call comes from the payphone, the LEC will attach the digits to that call and then forward it into the system. As we see it, that makes no real difference: whether an LEC transmits the Flex-ANI digits to the payphone, which then transmits them — necessarily back through the LEC — into the system, or whether that circular route is avoided and the LEC adds the Flex-ANI digits when the call comes to it from the payphone, the result is necessarily the same. By the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached — or should be. And, for good or ill, the FCC has made it clear that it is the duty of the PSP — vis-à-vis the completing carrier — to make sure that happens.

[4] We have no reason to believe that the FCC did not understand the industry and its practices when it adopted the 1998 Payphone Order, but it, nevertheless, made it quite clear that the ultimate transmission obligation is upon the PSP, rather than upon the completing carrier. That cannot be dis-

[16]*See, e.g.*, Webster's Third New International Dictionary 1827 (1986) (provide means to equip, to afford, to yield, and synonyms are supply and furnish); The Oxford English Dictionary 713 (2d ed. 1989) (provide means to "[t]o supply or furnish for use; to yield, afford.").

[17]We recognize that "provide" can be used in the sense of prepare, as in "I have provided for my retirement." Here, however, it is coupled with to transmit, which underscores a "provide to" reading.

charged by making a provision to transmit; transmission itself is required.[18] Nevertheless, while a PSP is responsible for transmission of the proper information in the first place, its obligation ends there. Others have the duty of tracking and capturing that information, one way or another,[19] once it is sent into the system. *See* 47 C.F.R. § 64.1310(a)(1).

[5] Because the district court did not deem it relevant, it did not make findings about whether the Flex-ANI codes for the calls in question were sent into the system by GCB and its LEC. That question must now be decided. Therefore, we will vacate the district court's judgment and remand for further proceedings. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1091 (9th Cir. 2002).

III. *Other Issues*

[6] U.S. South claims that certain exhibits of telephone data admitted by the district court were hearsay. However, U.S. South did not make that objection about those exhibits at trial, so the argument is waived. *See United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990); *United States. v. Wilson*, 690 F.2d 1267, 1273-74 (9th Cir. 1982). The argument U.S. South did make was that the information in question was not disclosed to it during discovery. However, the record belies that claim. While it might not have been disclosed in what U.S. South would take to be an ideal form, it was produced and the district court did not abuse its discretion when it admitted the evidence.

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[18]The FCC has also made it clear that "for payphones to be eligible for compensation 'payphones will be required to transmit specific payphone coding digits.' " 1998 Compensation Order, 13 FCC Rcd. 4998, 5006-07, ¶ 13.

[19]*See, e.g.*, 2003 Payphone Order, 18 FCC Rcd. 19975, 19994, ¶ 39 (SBR may use "technology of its choice to track coinless payphone calls . . . .").

[7] U.S. South also complains about the admission of bills received by GCB from its LECs. U.S. South claims that the documents amounted to hearsay. Fed. R. Evid. 801(c). GCB replies that the bills were not admitted for the truth of the matter asserted, because they were admitted only to show that GCB owned the ANIs in question. But that, itself, is a hearsay assertion. *See United States v. Jefferson*, 925 F.2d 1242, 1252 (10th Cir. 1990); *NLRB v. First Termite Control Co., Inc.*, 646 F.2d 424, 426 (9th Cir. 1981). In any event, because there was much other evidence, which made it clear that GCB did have payphone lines for its payphones, any error was harmless. *See Valdivia*, 599 F.3d at 993.

[8] U.S. South also complains about the district court's refusal to enforce a putative settlement, but, as the district court pointed out, largely because of U.S. South's refusal to agree to part of the settlement terms, it was not enforceable. We perceive no abuse of discretion. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). To the extent that U.S. South argues that it had agreed to GCB's monetary demand and, therefore, the district court lost jurisdiction, the record belies its assertion. This case is quite different from one where a matter has become moot because an opposing party has agreed to everything the other party has demanded. *See, e.g., Spencer-Lugo v. INS*, 548 F.2d 870, 870 (9th Cir. 1977) (per curiam) (where INS agreed to exactly what petitioners wanted, no case or controversy remained); *see also Samsung Elec. Co, Ltd. v. Rambus, Inc.*, 523 F.3d 1374, 1379 (Fed. Cir. 2008) (where opposing party agreed to pay full amount of other party's attorney's fees, the attorney's fees issue became moot); *Rand v. Monsanto Co.*, 926 F.2d 596, 597-98 (7th Cir. 1991) (when defendant agreed to pay the full amount of plaintiff's demand, no justiciable dispute remained). Here U.S. South never agreed to pay the full amount that GCB wanted. Rather, GCB said it would settle for less money than it claimed it was due if it also received an agreement by U.S. South to enhance its tracking system by doing a different

method of testing. U.S. South then sent a proposed agreement for the lower sum plus some tracking improvements, but GCB wanted a different configuration of tracking improvements. The settlement discussions ultimately fell apart. The district court neither could have nor should have forced GCB to accept the lesser sum, without the tracking improvements. Certainly the district court did not lose jurisdiction over the case.

[9] Nor do we perceive any abuse of discretion in the district court's declining to allow post-trial briefing regarding U.S. South's belated primary jurisdiction arguments. Nor do we perceive any abuse of discretion in the district court's refusal to extend discovery deadlines. *See O'Neill*, 50 F.3d at 687-88; *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607, 610-11 (9th Cir. 1992).

Finally, U.S. South complains about the interest rate used by the district court and about the amount of the attorney's fees award against it. Because we have set aside the judgment, both the award of interest and the award of fees fall with it. We will not guess at the ultimate outcome; we decline to issue an advisory opinion on those issues.

CONCLUSION

In this matter, GCB won battles at the district court and U.S. South has won a battle here. Each has hoped for a crushing blow to end this agon. Alas, that will not come today, and, we suppose, their cangling will continue for now. That is to say, we reject GCB's contention that all it and its LEC need to do is make provision for sending a Flex-ANI code with dial-around calls. GCB, through its LEC, must assure that the Flex-ANI is transmitted into the system; their duty ends there. The problem may then be U.S. South's, but we leave the question of whether it must then pay compensation to GCB for another day.

REVERSED and REMANDED for further proceedings.[20] The parties shall bear their own costs on appeal.

[20]To avoid any misunderstanding, we hasten to add that nothing we have said here is intended to preclude the district court from taking further evidence on any other issue in the case. Nor do we intend to preclude the district court from revisiting and reconsidering the question of whether the primary jurisdiction doctrine should be applied to this case, especially in view of the fact that there has been some difficulty in determining the proper construction of the FCC's orders. *See Brown*, 277 F.3d at 1173.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing Opposition to be served on Petitioners this 31st day of August, 2011, by sending a copy thereof by U.S. mail, postage prepaid, and via electronic mail, to:

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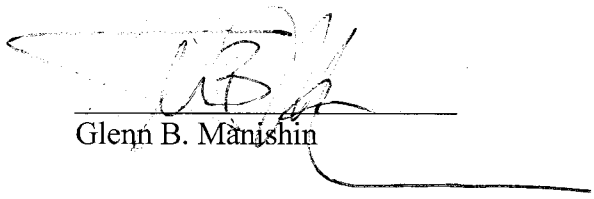

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